No. 16,184

IN THE

United States Court of Appeals

For the Ninth Circuit

ARTHUR KING WILSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES OF AMERICA.

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OPINION BELOW.

The opinion of the District Court, from which this appeal is taken, was handed down in writing on July 28, 1958, and filed the same date. (R. 78-82.)

JURISDICTION.

On November 16, 1955, an indictment in six counts was filed against appellant in the United States District Court for the Northern District of California, Southern Division, charging willful attempt to defeat and evade the payment of federal income taxes and

Federal Insurance Contributions Act (Social Security) taxes withheld from the wages of employees of the Coast Redwood Company, Inc., for the second, third and fourth quarters of 1952 in violation of Section 2707(c), Internal Revenue Code of 1939 (Title 26, U.S.C. (1939 ed.), Sec. 2707(c)).

Trial by jury was waived and appellant was found guilty as charged. Sentence was imposed on August 2, 1956. Jurisdiction was conferred on the District Court by Title 18, U.S.C., Sec. 3231, and Rule 18, Federal Rules of Criminal Procedure.

On November 14, 1957, this court entered an opinion reversing the conviction and remanding the case to the district court for retrial in accordance with the principles set forth in this opinion. (R. 3-35.) After petition for rehearing was filed by appellee on February 27, 1958, this court entered an order modifying its original remand for retrial to a remand for reconsideration and for further findings if additional evidence was adduced by either party. (R. 36.) On petition for rehearing and for recall of mandate and for leave to file petition for rehearing by appellant, this court on April 16, 1958, made a further order and opinion denying the petition for rehearing and denying the petition for recall of mandate. (R. 38-40.) Thereafter, on July 18, 1958, further hearing was held by the district court as directed by this Honorable Court (R. 86-142), and on July 28, 1958, District Judge Louis E. Goodman rendered a decision finding the appellant guilty of the charges set out in Counts 1 to 6 of the indictment. On August 8, 1958, the ap-

pellant was sentenced to 18 months imprisonment and a fine of $5,000 on Count 1 of the indictment, and a sentence of 18 months on each of Counts 2, 3, 4, 5 and 6 of the indictment, to run concurrently with the sentence imposed on Count 1. (R. 82-84.) Notice of appeal was filed by appellant on August 8, 1958. (R. 84-86.) Jurisdiction of this court is invoked under Title 28, U.S.C., Secs. 1291, 1294.

STATEMENT OF THE CASE.

On February 27, 1958, this court remanded the appellant's case, *Wilson v. United States,* 250 F. 2d 312, to the district court as follows (R. 36):

> "The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

The mandate was returned to the district court on March 7, 1958, and the appellant then filed a Petition for Rehearing and a Petition for Recall of Mandate and for Leave to File Petition for Rehearing. The above petition was denied in a written opinion by this court on April 16, 1958, *Wilson v. United States,* 254 F. 2d 391. (R. 38-40.)

Pursuant to the above remand, the matter came regularly on for hearing before District Judge Louis

E. Goodman on July 18, 1958. (R. 86-87.) After a statement by Asst. U. S. Atty. Robert H. Schnacke (R. 87-99), a statement by Spurgeon Avakian, attorney for appellant (R. 99-119), a statement by the court (R. 119-122), a further statement by Mr. Schnacke (R. 122-126), a further statement by Mr. Avakian (R. 127-131), and further colloquy between the court and counsel, the matter was submitted without further evidence being adduced by either the United States or the appellant (R. 131-142).

In his written opinion filed on July 28, 1958, Judge Goodman stated in pertinent part:

> ". . . Upon appeal, the Court of Appeals, reversed the judgment of conviction and remanded the cause to this Court 'for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so.'
>
> "The Government elected not to introduce any further evidence. Hence the defendant made no evidentiary response. The Court thereupon heard arguments of counsel with respect to the reconsideration of its former decision. *I have reconsidered the former decision in the light of the opinion of the Court of Appeals and of the arguments and written suggestions of counsel.*" [Italics supplied.]
>
> ". . . It is sufficient to say that at the time of decision the Court adjudged the defendant guilty

because it was convinced beyond a reasonable doubt that defendant had wilfully and for the evil motive of tax evasion affirmatively committed the acts charged in the indictment."

* * * *

"Findings

"The Court finds that its 'conception of the constituent elements of the offense' is the same now as it was at the time of judgment, namely that for a conviction the evidence must show beyond a reasonable doubt the defendant wilfully and with the evil affirmative motive of tax evasion committed the acts charged in the indictment in violation of Section 2707(c) of the Internal Revenue Code of 1939.

"The Court was and is convinced beyond a reasonable doubt and finds that the defendant wilfully and with the evil motive of tax evasion did commit said acts." [Italics supplied.] (R. 78-82.)

STATUTE INVOLVED.

Title 26, United States Code, Section 2707(c):

"(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or im-

prisoned for not more than five years, or both, together with the costs of prosecution."

QUESTIONS PRESENTED.

1. Did the district court comply with the mandate of the Court of Appeals expressed in its opinion of November 14, 1957, as amended by order of February 27, 1958?

2. Should the Court of Appeals reverse its decisions on the following questions:

(a) Was the partial remand entered in this case by this Honorable Court on February 27, 1958, proper, as so determined by written opinion filed April 16, 1958? (R. 38-40.)

(b) Was the evidence sufficient to sustain the verdict, as so decided by this Honorable Court in its opinion entered herein on November 14, 1957? (R. 3-38.)

(c) Was there no error in the exclusion of evidence that appellant, through his attorney, had negotiated and entered into an understanding and agreement with representatives of the Internal Revenue Service in 1955, as so decided by this Honorable Court in the opinion entered herein on November 14, 1957? (R. 3-35, at pages 34 and 35.)

SUMMARY OF ARGUMENT.

I. The District Court Wholly Complied With the Mandate of the Court of Appeals.

The remand of the Court of Appeals filed on February 27, 1958, as an amendment to the original opinion of the court filed on November 14, 1957, called for two actions on the part of the district court:

(1) Reconsideration of the case by the district court in accordance with the principles set forth in the opinion of November 14, 1957; and

(2) Further findings after additional evidence, if any, has been introduced by the Government and/or the appellant.

The second portion of the remand became moot upon the failure of either party to this controversy to introduce additional evidence. The proper interpretation of the first portion of the remand for reconsideration of the case in accordance with the principles set forth in the opinion of November 14, 1957, therefore becomes the only substantial issue on this appeal.

It is the position of the Government and was the position of the trial court that the first portion of the remand required the trial judge to make a finding as to whether or not he had the proper conception of the degree of proof of willfulness required to establish attempted evasion of the payment of tax. Since this was obviously a subjective matter the question could only be completely and correctly answered by the trial judge; although, as the Court of Appeals observed in its original opinion, his comments made

during the course of trial made it seem as though he had not used the correct standards as delineated in that opinion. (The Court of Appeals also noted that comments in the heat of trial are not a reliable measure of this factor in all cases.) By a written opinion, findings and conclusions dated July 28, 1958, the trial judge held that he had used the proper criterion in determining the presence of willfulness in formulating his original decision and that he was then and now is of the opinion that the evidence adduced by the Government convinced him beyond a reasonable doubt that the appellant was guilty of tax evasion and, particularly, that he was convinced beyond a reasonable doubt that appellant's actions as shown by the Government evinces his evil motive to evade taxes. Such a finding, of course, precludes any necessity for the trial judge to make specific detailed findings of fact and conclusions of law from the original record.

Appellant would construe the mandate to require a full scale detailed statement of facts and conclusions of law on the part of the district court or, in short, that he should have had a new trial based upon the record of the first trial. It is the position of the Government that the mandate was a partial mandate (as is argued elsewhere by the appellant in his brief) and that it was confined to the resolution of the only issue in this case; to wit: whether he applied the proper conception of the law to the facts at the time of his original decision and that appellant's construction of the mandate would compel the trial judge to perform useless and idle acts.

II. The Previous Opinions Entered Into by the Court of Appeals in This Controversy Have Adjudicated the Other Questions Raised by Appellant.

It is the position of the Government that the remaining questions raised in appellant's brief have been adjudicated by this Honorable Court in its opinions of November 14, 1957, as amended by order of February 27, 1958, and of April 16, 1958, and that, therefore, the appellant should be adjudged bound by these opinions which constitute the rule of the case on this appeal.

(a) Appellant argues that the action of the Court of Appeals in remanding the instant case for reconsideration in accordance with the principles expressed in the opinion of November 14, 1957, as amended by order of February 27, 1958, was improper. His arguments on this score, which have heretofore been embodied in a document entitled "Petition for Rehearing and Petition for Recall of Mandate and for Leave to File Petition for Rehearing," were considered by this court and on April 16, 1958, by written opinion, this court determined the remand to be proper.

(b) Appellant argues that the conviction in this case was not supported by substantial evidence. The opinion of this court dated November 14, 1957, clearly stated that if the trial court had in mind the proper principles of law there was no question but what the facts proved by the Government would be sufficient to support the verdict. Since the trial judge has now stated that he had the proper requirements of the law in mind at the time of his original decision, appellant should not be permitted once again to question the sufficiency of the evidence.

(c) Appellant argues that he should have been permitted to put in evidence a showing of certain negotiations looking toward payment of taxes which took place long after the investigation and indictment in this case. This same question was decided against appellant after full consideration of his arguments by this court in its opinion of November 14, 1957.

ARGUMENT.

I.

THE DISTRICT COURT WHOLLY COMPLIED WITH THE MANDATE OF THE COURT OF APPEALS.

Appellant's principal contention upon this appeal is that the mandate of the Court of Appeals required the trial court to reconsider all of the evidence adduced in the original trial of this case and to make special findings of fact which set forth the particular acts considered to be the "tax evasion conduct" and to state whether those acts were done with or without the requisite evil intent. It is the position of the Government that the reconsideration to be given by the trial court was directed to the sole issue of whether or not the trial judge had the proper principles of law in mind at the time of his original decision; that if he did, then it was clear that the evidence would support the verdict; that if the trial judge did not have the proper principles in mind at the time of rendering his original decision, then and then only would he be required to make a new determination as to whether or not the appellant had the

specific evil intent to evade the payment of taxes. In either event, it is the position of the Government that the specific detailing of alleged particular acts considered to be tax evasion conduct was nowise contemplated by the mandate. It is a hornbook principle of criminal law that intent must be drawn from the myriad of small details which go to make up the conduct of the defendant during the period in question and cannot, and should not, be tied down to specific individual acts.

Intent is, of course, a subjective matter and not subject to direct proof. The reason why the appellant indulged in a course of conduct is a matter which must be drawn from the conduct itself and circumstances surrounding it, from the conduct and demeanor of the appellant upon the witness stand,—from the "gestalt." *Battjes v. United States* (C.A. 6th 1949) 172 F. 2d 1,[1] and *United States v. Cole,* (D.C. S.D. Cal. 1950) 90 F. Supp. 147.[2]

The original opinion in this case was returned by this court on November 14, 1957, *Wilson v. United States,* 250 F. 2d 312. It is beyond all controversy that this court determined that the evidence was sufficient to support the verdict if at the time of

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[1] "*Direct proof of wilful intent is not necessary. It may be inferred from the acts of the parties, and such inference may arise from a combination of acts, although each act standing by itself may seem unimportant. It is a question of fact to be determined from all the circumstances.*" [Italics supplied.]

[2] ". . . we have to consider what the Germans express by the word, the *gestalt.* 'Gestalt,' as used in psychology or philosophy, means that in considering a situation we must take into consideration everything which bears upon it, both objective and subjective."

pronouncement of that verdict the trial court had in mind the proper principles of law concerning the degree of proof of willfulness necessary in cases of this type.[3] Comments of the trial judge made during the trial were cited in that opinion, and this court concluded that it did not appear that the trial court had in mind the proper conception of the law as delineated in the opinion. Therefore, it was held that the case should be remanded to the district court for a new trial. Thereafter, the Government petitioned for a rehearing wherein it was argued that a review of the entire record, regarding it in the light most favorable to the Government, disclosed that the trial court did apply the proper standard of willfulness to the offense. (Appellee's petition for rehearing, No. 15,301, page 3.) The petition went on to state that "Since this Honorable Court agrees that the evidence was adequate to establish wilful positive acts of evasion, or in other words, a wilful attempt to defeat

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[3]". . . the diversion of available funds to affiliates and other creditors in preference to payment of Government obligations qualifies as an affirmative act under the statute and would warrant conviction if done with the requisite state of mind." (R. 20.)
". . . It may be that appellant directed disbursements in good faith and solely for the purpose of preserving the business or it may be that he so acted in part to evade or defeat the payment of taxes. It could also be that the disbursements were not made with intent to evade the payment of the taxes, but that the failure to pay was itself motivated by a desire to evade the payment of the taxes, in which case appellant could be convicted of the misdemeanor created by § 2707(b). And finally, it may be that appellant did not commit any crime, and could only be held civilly accountable under § 2707(a). All these possibilities exist. . . .
". . . The evidence adduced in the instant case is such that a verdict following any of the foregoing alternatives, if properly found, would be sustained." (R. 33.)

and evade the payment of withholding and social security taxes, the question narrows down to the issue of whether such acts were done with the requisite state of mind." The petition went on to advise the court that "The trial of this case consumed nine days and resulted in 973 pages of the printed record and voluminous accounting exhibits. *To require retrial solely for the purpose of affording the trial Court an opportunity to reappraise the evidence in the light of the standard of law as enunciated in this Court's opinion would entail unnecessary expenditure of time and money. There being no other error, it is manifest that the trial Court having the record before it could readily make such special findings under Rule 23 as may be necessary to clarify the factual basis upon which he determined the existence of appellant's specific wilful intent to evade payment of the withheld taxes.*" [Italics supplied.]

With this brief in mind and as a direct result thereof, on February 27, 1958, this court by written order amended the written opinion of November 14, 1957, by striking out the paragraph remanding the case to the trial court for a new trial and inserting the following, *Wilson v. United States,* 250 F. 2d 312:

> "The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

The material facts in this case have never been in any substantial dispute. The only thing in contention is what conclusions should be drawn from those facts. It is clear (1) that the Court of Appeals in the original opinion filed November 14, 1957, held that the trial court probably did not use the proper standards of law in drawing the conclusion of willful intent on the part of the appellant; (2) that the Government filed a petition for rehearing in which they respectfully took issue with that conclusion of the court and suggested that in lieu of a complete retrial the matter be referred back to the trial judge in order to clarify the standard that he had used in adjudging the appellant guilty as charged; and (3) that on consideration of the brief the Court of Appeals did remand the matter back to the trial court for that specific purpose and to allow the Government and/or the defendant to place additional evidence into the record bearing on this particular question.

This partial remand was immediately recognized by the appellant as such and was attacked in his petition to this court in a document entitled "Petition for Rehearing and Petition for Recall of Mandate and for Leave to File Petition for Rehearing." After due consideration of appellant's position, the Court of Appeals in an opinion dated April 16, 1958, held that the partial remand was proper and warranted, *Wilson v. United States,* 254 F. 2d 391.

The second section of the remand calling for further findings by the trial court after the parties had been accorded an opportunity to introduce additional

evidence has become moot in view of the fact that no additional evidence was adduced.

The first portion of the remand required the trial judge to give reconsideration to the case in accordance with the principles set forth in the opinion. The words "the principles set forth in this opinion" refer to the law concerning the proper degree of proof required for a finding of willfulness in a tax evasion case. The trial judge in his opinion, findings and decision filed July 28, 1958, stated "I have reconsidered the former decision in the light of the opinion of the Court of Appeals and of the arguments and written suggestions of counsel." (R. 79.) He went on to find that his conception of the constituent elements of the offense was the same as it was at the time of judgment, and that "The Court was and is convinced beyond a reasonable doubt and finds that the defendant wilfully and with the evil motive of tax evasion did commit said acts." (R. 82.)

The conception of the law by the trial judge is a subjective matter and the person most qualified to state unequivocally what his conception of the law was at the time of the decision is the trial judge himself. Certainly every favorable inference should be accorded his veracity and integrity. If credence is given to this finding of the trial court, certainly the mandate of the Court of Appeals does not require the trial court to laboriously detail findings of fact and conclusions of law to reach the same conclusion.

The appellant argues that the trial judge did not review the record of the first trial and has refused to

do so. His argument has been drawn from a comment made by the trial court during the argument on rehearing. A contrary conclusion must be drawn from the written opinion, findings and conclusions promulgated by the trial court on July 28, 1958, ten days after the rehearing. In that written opinion, findings and decision the trial judge recited, "I have reconsidered the former decision in the light of the opinion of the Court of Appeals and of the argument and written suggestions of counsel." (R. 79.) From these words it is respectfully submitted it cannot but be assumed the trial court reviewed the record. It is of course true that the trial judge refused to laboriously detail findings of fact, contenting himself with the one and only necessary finding of his conception of the law at the time of the original decision. Once again, appellant has confused the oral comments of the court made during the argument with the formal findings as embodied in the written opinion.

But, appellant argues, upon the rehearing, appellee presented to the district court a detailed document containing such detailed findings of fact and conclusions of law and, therefore, the Government itself construed the mandate as requiring this useless and tedious analysis of a dry record. Of course, it devolved upon the Government to be prepared for any contingency, and had the district judge determined that in the original decision he had applied the wrong standard of law, then he may have felt required to detail the facts and determine under the proper standards of the degree of proof of willfulness re-

quired, whether or not he should draw the ultimate conclusion of guilt. The findings of fact and conclusions of law were presented by the Government to aid him in that endeavor should it be necessary. It has always been the position of the Government in this case that there was a clear showing of conduct from which the determination of the existence of the evil motive of tax evasion could be drawn and, accordingly, the Government had no hesitation in denominating and delineating some of those facts for the use and assistance of the trial court.

To recapitulate, it is the contention of the Government that the mandate called for an initial determination by the trial judge as to whether or not he had applied the proper principles of law to the facts in making his original decision. The trial court has found as a fact that he did apply the proper principles of law in making his original decision and, consequently, it is not necessary to consider what he would have to do by way of making specific and detailed findings of fact (if these indeed were required) in the event he found that he initially did not apply the proper principles of law. Appellant argues that he was *too* required to make specific and detailed findings of fact from which the evil motive of tax evasion had been concluded even though he should determine that he had applied the proper principles of law in the initial decision. The Government submits that this Honorable Court will not and did not require the trial court to perform the tedious and useless labor of an idle act.

II.

THE APPELLANT'S OTHER ASSIGNMENTS OF ERROR HAVE HERETOFORE BEEN ADJUDICATED BY THE COURT OF APPEALS AND SUCH ADJUDICATIONS CONSTITUTE THE RULE OF THE CASE.

(a) Partial Remand Was Proper and so Adjudicated by Written Opinion of This Honorable Court Filed April 16, 1958.

Appellant's argument candidly admits that the court has already adjudicated the propriety of a partial remand in this case. (Appellant's brief, p. 26.) Since this is so, this adjudication constitutes the rule of the case and should not be reargued on this appeal. *Fisher v. United States* (C.A. 9th, 1958), 254 F. 2d 302, 304; and *Marron v. United States* (C.C.A. 9th, 1926), 18 F. 2d 218; affirmed 275 U.S. 192; 48 S.Ct. 74; 72 L. ed. 231.

We might add that in his specification of errors appellant alleges that the district court committed error, but his argument is all directed to the alleged error of the Court of Appeals in remanding this matter for reconsideration rather than retrial. We note also that his argument in this section tacitly admits that the trial court properly construed the mandate of the Court of Appeals, a position which is rather inconsistent with the argument contained in the first section of his brief.

The only question reflected in the original opinion of the Court of Appeals in this case was whether the trial court had used the proper criterion in determining the degree of willfulness which the evidence imputed to the defendant. The trial court stated that it wholly agreed with the criterion established in the

opinion of the Court of Appeals, that it originally used that criterion, and was still of the same opinion. Appellant would now have this court reverse itself, remand the case for retrial, recall the witnesses to recite over again the same acts of the appellant that they did in the original trial, require the trial judge to recite the same conclusion from the same findings of fact, and, presumably, take the same appeal to this court a third time. The uncertainty in the original appeal has been cured; the lack is supplied. Must there be a repetition of the play because appellant does not agree with the statement of the trial court that he had the proper frame of mind at the time judgment was pronounced? Should appellant be permitted to attack the integrity of the trial court on this subjective matter?

Propriety of the remand has heretofore been determined and constitutes the rule of the case.

(b) There Was Substantial Evidence to Support the Conviction as Adjudicated by the Court of Appeals by Opinion Filed November 14, 1957, as Amended by Order of February 27, 1958.

Despite the fact that the district court has twice held there was substantial evidence to support the conviction, and despite the fact that the Court of Appeals has held that there is substantial evidence to support the conviction,[4] appellant argues to the contrary. The decision of the Court of Appeals on the prior appeal, at Record 33, is dismissed by the appellant as dictum. In fact, it is painfully apparent that

[4]See footnote 3, page 12.

appellant does not consider himself bound by any of the prior decisions in this case. It is clear that the prior decision of the Court of Appeals constitutes the rule of the case and should not be disturbed in this proceeding. *Fisher v. United States* (C.A. 9th, 1958), 254 F. 2d 302, 304; *Marron v. United States* (C.C.A. 9th, 1926), 18 F. 2d 218; affirmed 275 U.S. 192; 48 S.Ct. 74; 72 L. ed. 231.

Assuming *arguendo* that appellant is entitled once more to contest the substantiality of the evidence, the Government is content to rest upon its arguments in its brief on the original appeal, and on those in its petition for rehearing, as well as the opinion of this court that there is substantial evidence to support the conviction. Although appellant's brief seems to indicate to the contrary, there is no evidence other than that adduced in the original trial before this court for consideration.

(c) The Exclusion of Evidence of Negotiations With the Internal Revenue Service in 1955 Was Not Error and Was Adjudicated by the Court of Appeals in the Opinion Entered Herein on November 14, 1957, as Amended by Order of February 27, 1958.

Appellant again argues that evidence of appellant's negotiations with representatives of the Internal Revenue Service in 1955 should have been admitted by the trial court even though this question was specifically decided by this court in the opinion of November 14, 1957, *Wilson v. United States,* 250 F. 2d 312. Appellant does not even deign to argue the matter in his present brief but in all innocence refers this court to the argument in his brief on that prior ap-

peal. The adjudication of this court constitutes the rule of the case. *Fisher v. United States* (C.A. 9th, 1958), 254 F. 2d 302, 304; and *Marron v. United States* (C.C.A. 9th, 1926), 18 F. 2d 218; affirmed 275 U.S. 192; 48 S. Ct. 74; 72 L. ed. 231.

CONCLUSION.

The district court complied with the mandate of the Circuit Court and reconsidered its decision in the light of the principles expressed by the Court of Appeals in its opinion dated November 14, 1957, as amended by order of February 27, 1958. The other assignments of error alleged by appellant have heretofore been adjudicated by this court and appellant is bound thereby since they constitute the rule of the case. The appeal should be dismissed.

Dated, San Francisco, California,
January 22, 1959.

Respectfully submitted,

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